

**DOMESTIC PARTNERS AND "THE CHOICE ARGUMENT": *QUO VADIS?*****B Coetzee Bester and A Louw\*****SUMMARY**

In the absence of formal legal recognition, domestic partners are required to regulate the consequences of their relationship by utilising alternative regulatory measures and remedies which are, for the most part, inadequate. The traditional justification used to differentiate between domestic partners and spouses is known by some as the choice argument. The choice argument is based on the rationale that persons who choose not to marry cannot claim spousal benefits. It understands choice narrowly as it takes into account only an objective legal impediment to marriage. As such, it has been the driving force behind the non-recognition of heterosexual domestic partnerships. Same-sex domestic partnerships, on the other hand, have until recently been recognised under the choice argument on an *ad hoc* basis, as there existed an objective legal impediment to their marriage, namely their sexual orientation. According to the majority of legal commentators the enactment of the *Civil Union Act* 17 of 2006 removed the objective legal impediment against same-sex marriage. They therefore argue that the choice argument should now be applied to both heterosexual and same-sex domestic partners equally. However, the Constitutional Court has expressed some doubt as to the correctness of this assumption. Taking into consideration the choice argument's narrow understanding of choice, together with the possible unfair discrimination caused by its application, an alternative theoretical basis for the future recognition and regulation of domestic partnerships had to be found. Three possible solutions were investigated, namely the model of contextualised choice, the function-over-form approach, and finally the Smith model. Because of the invasive effect of the latter two approaches, this study advocates for the adoption of the model of contextualised choice. If adopted it would mean that the subjective

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\* Ben Coetzee Bester. LLB LLM (Pret). Academic Associate, Department of Public Law, University of Pretoria. The article is an adapted version of the first author's Research LLM dissertation by the same title completed under the supervision of the second author in the Department of Private Law. E-mail: bencbester@gmail.com.  
Anne Louw. LLB LLD (Pret.) Senior Lecturer, Department of Private Law, University of Pretoria. E-mail: Anne.Louw@up.ac.za.

considerations of domestic partners will be taken into account and they will be afforded with a minimum degree of protection based on need. After having accepted this approach the study had to determine to what extent proposed legislation adopts a contextualised approach to choice. Accordingly, it had to be determined whether proposed legislation provides domestic partners with need-based claims while still upholding the established differences between domestic partnerships and formalised relationships. It was ultimately concluded that the proposed legislation would have the effect of blurring the differences insofar as registered domestic partnerships were concerned, the reason being that such a partnership comes into existence through a public expression of the partners' commitment and, as such, does not really fall within the ambit of the definition of a domestic partnership in the narrow sense of the word. With regard to unregistered domestic partners, it was concluded that the proposed legislation went too far in protecting unregistered partners' proprietary rights (even if only on an *ex post facto* basis) as these claims were not based on need. It was therefore recommended that the proposed legislation be redrafted. If not redrafted the proposed legislation would have the effect not only of infringing on the autonomy of one or both of the partners but also of creating a regulatory system which does not fully appreciate the differences between marriage and domestic partnerships.

**KEYWORDS:** domestic partners; domestic partnerships; choice argument; contextualised model of choice; functional approach to family law; *Draft Domestic Partnerships Bill* of 2008.